Supreme Court, U. S.
FILED
MAR 17 1975
MICHAEL RODAK, JR., CLERK

No. 74-1179

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

MITCHELL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

MITCHELL MILLER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-35a) is reported at 500 F.2d 751. The dissent from the denial of rehearing *en banc* (App. C, *infra*, pp. 38a-53a) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 36a-37a) was entered on September 13, 1974. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on January 15, 1975 (App. C, *infra*, pp. 38a-53a). By an order

dated February 6, 1975, Mr. Justice Powell extended the time for filing a petition for a writ of certiorari to and including March 16, 1975 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a bank depositor has standing under the Fourth Amendment to challenge alleged irregularities in the issuance and scope of a subpoena *duces tecum* directed to a bank seeking production of its records of his account.

2. Whether (assuming a depositor has standing) a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment (1) because issued by the district court clerk and completed by the United States Attorney's office on behalf of the grand jury, (2) because the grand jury was not sitting on the subpoena's return date, or (3) because the subpoena demanded production of all records relating to a named depositor for a period of approximately four months.

3. Whether, assuming a Fourth Amendment violation, a retrial was the proper remedy and, if so, whether exclusion of the evidence obtained by the defective grand jury subpoenas is required in the retrial.

CONSTITUTIONAL PROVISION AND RULES INVOLVED

The Fourth Amendment to the Constitution provides in pertinent part:

> The right of the people to be secure in their * * * papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.

Rule 17(a), Federal Rules of Criminal Procedure, provides in pertinent part:

> A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title, if any, of the proceeding, and shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena; signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served. * * *

Rule 17(c), Federal Rules of Criminal Procedure, provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

STATEMENT

1. On January 9, 1973, while fighting a fire at the Southeastern Metal Company warehouse in Kath-

leen, Georgia, officials of the County Sheriff's Department discovered a 7,500 gallon-capacity distillery, 175 gallons of non-tax-paid whiskey, and related paraphernalia (Tr. 32-44).[1]

The evidence showed that respondent had arranged for rental of the warehouse (Tr. 783-789) and had purchased a water pump (Tr. 240-247) and radio equipment found in the warehouse (Tr. 247-258). He had also arranged for the purchase of a truck (later found to contain a still cap and wheat shorts) (Tr. 572-586; 559-568; 568-572), paid for repairs of two vans used in the distillery operation (Tr. 327-340), and inquired about making large purchases of sugar (up to 1,000 tons) for a distillery operation (Tr. 298-327).

At trial,[2] respondent denied complicity in the distillery operation (Tr. 815-819) and claimed that he had provided these services at the request of a friend of a long-time associate (Tr. 782-790; 818-820).

Respondent and two others[3] were convicted on each of five counts of possessing an unregistered still,

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[1] "Tr." refers to the two-volume transcript of the trial, held May 7-14, 1973. "S. Tr." refers to the one-volume transcript of the suppression hearing, held April 18 and 23 and May 7, 1973.

[2] Respondent's first trial ended in a mistrial on May 1, 1973. A second trial commenced on May 7, 1973.

[3] Of the five persons indicted for conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits, John Henry McDuffie and Susan McDuffie Weeks were tried and convicted with respondent. The charges against Terry Lee Smith were dismissed prior to

carrying on the business of distillers without giving bond and with intent to defraud the government of whiskey tax, possessing 175 gallons of whiskey upon which no taxes had been paid, and conspiracy to defraud the United States of tax revenues, in violation of 18 U.S.C. 371 and 26 U.S.C. 5601, *et seq.* Respondent was sentenced to concurrent terms of three years' imprisonment on each count.

2. Prior to the initial trial, respondent moved to suppress certain checks and other bank records that he claimed had been obtained by means of illegal grand jury subpoenas *duces tecum.* The district court denied the motion (S. Tr. 54).

The subpoenas had been issued in blank by the district court clerk and completed by the U. S. Attorney's office at the request of Treasury Department agents who were investigating the distillery operation. The subpoenas required the presidents of two Georgia banks[4] to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m. on January 24, 1973, and to produce (App. A, *infra*, p. 11a)

> all records of accounts, *i.e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or

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trial, and Joseph Kenneth Brooks' motion for severance was granted.

[4] The subpoenas were served on Barry Jones, president of The Citizens and Southern National Bank, Warner Robins, Georgia, and Harold Peavey, president of the Bank of Byron, Byron, Georgia.

Mitch Miller, Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date [January 23, 1973].

The agents received microfilm records of respondent's checks and deposit slips, maintained by the banks in compliance with regulations issued under the Bank Secrecy Act of 1970, 84 Stat. 1114, 12 U.S.C. 1829b(d) (App. A, *infra*, p. 12a).[5] The agents then informed the bank presidents that it would not be necessary for them to appear in person before the grand jury. The grand jury met February 12, 1973, nineteen days after the return date on the subpoenas.[6]

Several copies of respondent's checks and deposit slips were introduced into evidence at trial (App. A, *infra*, pp. 11a-12a). They also provided in "one or two instances" investigative leads to other evidence introduced at trial (S. Tr. 46).

3. On appeal, a panel of the Court of Appeals for the Fifth Circuit held that the subpoenas *duces tecum* served on the two banks were faulty because they were issued by the United States Attorney's office rather than by the district court or the grand jury, were returnable on a date when no grand jury was in session, and required "broad disclosure" of respondent's financial records to the government (App. A, *infra*, p. 15a). The court further held that obtaining copies of respondent's bank checks by means of a faulty subpoena *duces tecum* constituted an unlawful invasion of respondent's "privacy" (App. A, *infra*, p. 11a), and that respondent therefore was "entitled to a new trial free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a).[7]

4. The government's Suggestion for Rehearing *En Banc* was denied (App. C, *infra*, pp. 38a-53a). Seven Circuit Judges dissented from the denial on the grounds that "the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts" (App. C, *infra*, p. 39a) and that, even if depositor standing is assumed, "we do not agree that [the subpoenas] were defective. And even if the subpoenas were defective, no prejudice is shown such as to require their suppression" (App. C, *infra*, p. 48a).

REASONS FOR GRANTING THE WRIT

This case presents three important and related questions concerning grand jury subpoenas for bank records, about two of which the circuits are in sharp conflict: first, whether a bank depositor has standing

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[5] Mr. Jones testified that prior to the effective date of the regulations, his bank only made microfilm copies of selected transactions rather than of all checks and deposits (App. A, *infra*, pp. 12a-13a).

[6] The record does not reveal whether any of the bank records were presented to the grand jury.

[7] The court also affirmed Weeks' conviction and reversed McDuffie's conviction because of the introduction of evidence relating to a prior offense (App. A, *infra*, p. 35a). We do not seek review of the court of appeals' decision as it relates to McDuffie.

under the Fourth Amendment to challenge a subpoena of a bank's records pertaining to his account; second, assuming standing, whether a grand jury subpoena *duces tecum* is defective and violative of the Fourth Amendment when issued by the district court clerk and completed by the U.S. Attorney's office on behalf of the grand jury or when the grand jury is not in session on the subpoena's return date; and third, whether, assuming a Fourth Amendment violation, the appropriate remedy is exclusion of the evidence so obtained and retrial.

In recognizing a bank depositor's standing to challenge a grand jury subpoena for bank records, finding that a subpoena issued by the district court clerk and returnable on a date when the grand jury is not in session is defective and violative of the Fourth Amendment, and ordering a retrial "free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a), the court of appeals in the instant case adopted an unprecedented and unduly expansive notion of the content of the Fourth Amendment that will needlessly impede the investigative power of the grand jury, which "must be broad if its public responsibility is adequately to be discharged." *United States* v. *Calandra*, 414 U.S. 338, 344. The decision also creates a host of problems for federal prosecutors, who must adhere to formalistic and impractical requirements for issuing grand jury subpoenas *duces tecum* at possible risk of losing crucial evidence at trial, despite voluntary compliance with the subpoenas by those to whom they are directed.

1. The court of appeals assumed, without analysis, that bank records of a depositor's account are "private papers" of the depositor in which he has a Fourth Amendment interest (App. A, *infra*, p. 13a). But virtually every other circuit that has considered the issue (usually in the context of Internal Revenue Service summonses rather than grand jury subpoenas) has concluded, to the contrary, that a bank's records are not the private papers of its depositors, and that a depositor therefore has no standing to challenge the validity of a search or seizure of bank records of his account.[8]

Microfilm copies of depositors' accounts are bank property. "[T]he microfilm records [are] made and paid for by the Bank for its convenience and busi-

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[8] See *United States* v. *Continental Bank and Trust Co.*, C.A. 10, No. 73-1720, decided September 10, 1974; *Fifth Avenue Peace Parade Committee* v. *Gray*, 480 F.2d 326 (C.A. 2), certiorari denied, 415 U.S. 948; *Harris* v. *United States*, 413 F.2d 316, 318 (C.A. 9); *Galbraith* v. *United States*, 387 F.2d 617, 618-619 (C.A. 10); *O'Donnell* v. *Sullivan*, 364 F.2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969; *Application of Cole*, 342 F.2d 5, 8 (C.A. 2), certiorari denied, 381 U.S. 950; *De Masters* v. *Arend*, 313 F.2d 79, 85 (C.A. 9), petition for certiorari dismissed, 375 U.S. 936; *Foster* v. *United States*, 265 F.2d 183, 187-188 (C.A. 2), certiorari denied, 360 U.S. 912; *United States* v. *Peoples Deposit Bank & Trust Co.*, 112 F. Supp. 720, 723-724 (E.D. Ky.), affirmed, 212 F.2d 86 (C.A. 6), certiorari denied, 348 U.S. 838; *In re Upham's Income Tax*, 18 F. Supp. 737, 738 (S.D. N.Y.); *Cooley* v. *Bergin*, 27 F.2d 930, 933 (D. Mass.); cf. *Pollard* v. *Roberts*, 283 F. Supp. 248, 258-259 (E.D. Ark.), affirmed *per curiam*, 393 U.S. 14. But see *Burrows* v. *Superior Court of San Bernardino County*, 118 Cal. Rptr. 166 (Sup. Ct.), 529 P.2d 590, petition for rehearing denied, March 12, 1975.

ness purposes. The Bank own[s] the microfilm." *Harris* v. *United States*, 413 F.2d 316, 318 (C.A. 9). Hence the records are, like corporate records of salary payments and other transactions with an employee-taxpayer sought by an IRS summons, "records in which the taxpayer [or depositor] has no proprietary interest of any kind, which are owned by the third person, which are in his hands, and which relate to the third person's business transactions with the taxpayer [or depositor]." *Donaldson* v. *United States*, 400 U.S. 517, 523.[9] Since the Fourth Amend-

[9] As Mr. Justice Douglas observed in his concurrence in *Donaldson* (400 U.S. at 537), "it is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of the taxpayer, even if a criminal prosecution is contemplated or in progress."

In *Donaldson* this Court expressed specific approval of *O'Donnell* v. *Sullivan*, 364 F.2d 43, 44 (C.A. 1), certiorari denied, 385 U.S. 969, and *Application of Cole*, 342 F.2d 5, 7-8 (C.A. 2), certiorari denied, 381 U.S. 950, in which depositors' lack of proprietary interest in their bank account records was held to bar any protectable claim. Cases following *Donaldson* have uniformly denied depositors any right to intervene in summons enforcement proceedings for bank account records, on the ground that depositors have no proprietary interest in the records. See *United States* v. *National State Bank*, 454 F.2d 1249, 1251 n. 3, 1252 (C.A. 7); *Securities and Exchange Commission* v. *First Security Bank of Utah*, 447 F.2d 166, 168 (C.A. 10); *United States* v. *Bremicker*, 365 F. Supp. 701, 702-703 (D. Minn.); *United States* v. *Union Nat'l Bank*, 363 F. Supp. 629, 631-633 (W.D. Pa.); *United States* v. *Northwest Pa. Bank & Trust Co.*, 355 F. Supp. 607, 612, 614 (W.D. Pa.); *Smith* v. *Switzer*, 73-2 U.S. T.C., ¶ 9490 (W.D. Pa., May 30, 1973). See also *United States* v. *Luther*, 481 F.2d 429, 433 (C.A. 9) (taxpayer lacked proprietary interest in corporate records); *United States* v. *Weingarden*, 473 F.2d 454, 458,

ment protects a person "against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search or seizure directed at someone else," *Jones* v. *United States*, 362 U.S. 257, 261,[10] the only protectable Fourth Amendment interest at issue is that of the bank, not its depositor.

Nor does a bank depositor entertain any "reasonable expectation of freedom from governmental intrusion," *Mancusi* v. *DeForte*, 392 U.S. 364, 368; *Katz* v. *United States*, 389 U.S. 347, 352, with regard to his banking transactions. Names of payees, dates, and other memoranda appearing on negotiable instruments are not confidential communications. When a check is drawn, the instrument is cast forth upon the stream of commerce. A drawer understands that his payees may well endorse the instruments to third parties and that their endorsees may further endorse them. At the very least, the instruments "will be viewed by various employees at the bank where it is cashed and deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return." *Harris* v. *United States*, *supra*, 413 F.2d at 319-320. The bank itself is merely its depositor's debtor, hon-

n. 4 (C.A. 6) (taxpayer had no proprietary interest in attorney's records); *United States* v. *Widelski*, 452 F.2d 1, 4 (C.A. 6) (no proprietary interest or privilege in accountant's records).

[10] It is well established that the Fourth Amendment does not protect *jus tertii* interests. See *Alderman* v. *United States*, 394 U.S. 165, 171; *Wong Sun* v. *United States*, 371 U.S. 471, 492; *Goldstein* v. *United States*, 316 U.S. 114, 121.

oring instruments that the depositor-creditor sends into commerce. See Chorley, *Law of Banking* 13-22 (4th ed. 1960).

The Fourth Amendment, however, does not protect what "a person knowingly exposes to the public * * *." *Katz* v. *United States*, *supra*, 389 U.S. at 351. Nor is there any constitutional basis for "'constructing a wall of privacy against the grand jury which does not exist in casual contact with strangers.'" *United States* v. *Dionisio*, 410 U.S. 1, 14. While some may believe that it is nevertheless desirable as a matter of policy to adopt various measures limiting government access to bank records, this is a matter of legislative policy for determination by Congress, not a constitutional imperative.

The Bank Secrecy Act of 1970,[11] authorizing the Secretary of the Treasury to prescribe by regulation certain record-keeping and reporting requirements for banks, did not create any proprietary or privacy interest of depositors in their bank accounts where none existed before. Each bank continues to pay for copying and storing its records.[12] Indeed, with compulsory record-keeping, depositors have even less reason than before to expect that their transactions will

[11] 12 U.S.C. 1829b, 1730d, 1951-1959, and 31 U.S.C. 1051-1062, 1081-1083, 1101-1105, 1121-1122.

[12] In the instant case, both banks kept microfilm copies of customers' accounts in compliance with regulations issued under the Act. One of the banks had not maintained complete microfilm check records prior to the effective date of the regulations (App. A, *infra*, pp. 12a-13a).

be private. See *Couch* v. *United States*, 409 U.S. 322, 335; *United States* v. *White*, 401 U.S. 745, 752; cf. *Shapiro* v. *United States*, 335 U.S. 1. As this Court observed in *California Bankers Assn.* v. *Shultz*, 416 U.S. 21, 54, "in making the records required by the Secretary * * * [the bank] neither searches nor seizes records in which the depositor has a Fourth Amendment right."[13] In any event, it seems doubtful that legislation designed to insure the maintenance of records that "have a high degree of usefulness in criminal, tax, or regulatory investigations * * *," 12 U.S.C. 1829b(a)(2), should result in less governmental access to them than when the records were voluntarily maintained.[14]

[13] The Court's statement in *California Bankers* that government access to bank records under the Act would be "controlled by existing legal process" (416 U.S. at 52), upon which the court below relied, does not imply that a *depositor* has any protectable Fourth Amendment interest in the records. As the Court noted in the ensuing paragraph: "We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank *or the person under investigation* by the taxing authorities" (id. at 53; emphasis supplied). By implication, therefore, the right to "existing legal process" can be asserted by the bank but not by the depositor.

[14] The court of appeals' expansive notion of Fourth Amendment standing may imply a right to challenge governmental access to other records kept by third parties pursuant to regulation or statute, such as records of telecommunications (see 47 U.S.C. 605(5); *United States* v. *Covello*, 410 F.2d 536, 541-542 (C.A. 2); *United States* v. *Russo*, 250 F. Supp. 55, 59 (E.D. Pa.)); sales of firearms (18 U.S.C. 922(a)(6) and (d)(1)); controlled drugs (21 U.S.C. 207, 209, 211); or federal securities (15 U.S.C. 77, *et seq.*).

2. Even assuming that a depositor has standing to challenge a subpoena of bank records of his account, the court of appeals has radically (and, we submit, erroneously) departed from tradition and practice in holding that a grand jury subpoena is defective and constitutes an unreasonable search and seizure when it is "issued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of * * * financial records to the government * * *" (App. A, *infra*, pp. 14a-15a).[15]

"[E]xisting legal process" controlling governmental access to bank records, to which this Court referred in *California Bankers*, *supra*, 416 U.S. at 52, is that of "subpoena or summons duly authorized and issued or as may otherwise be required by law," 31 U.S.C. 1121(b) (416 U.S. at 54, n. 24). The subpoenas *duces tecum* in the instant case—issued by the clerk of the court and completed by the U.S. Attorney's office on behalf of the grand jury, returnable 19 days before the grand jury was to meet, and calling for bank records of respondent's accounts during a four-month interval—was duly authorized and issued in accordance with Rules 17(a) and (c), Fed.

[15] It is not clear whether the court intended that any of the three noted "defects" would alone have sufficed to justify the result it reached, or whether its action depended upon the convergence of all three factors. In any event, grand jury practice in the Fifth Circuit will necessarily be radically transformed in all these respects if the decision stands.

R. Crim. P.,[16] and with accepted grand jury practice. See *United States* v. *Morton Salt Co.*, 216 F. Supp. 250 (D. Minn.), affirmed *per curiam*, 382 U.S. 44; *United States* v. *Culver*, 224 F. Supp. 419 (D. Md.); *In re Subpoenas Duces Tecum*, 248 Fed. 137 (E.D. Tenn.).

The court of appeals imposed needless and impractical formalities upon this process that will substantially impede the effective functioning of the grand jury. The grand jury depends upon the presentation of relevant evidence in an orderly manner—necessitating that the government attorney review the evidence prior to grand jury consideration, often before the grand jury is called into session. For example, the practice in the Middle District of Georgia, according to the district court, is for the U.S. Attorney "to prepare for the calling of the grand jury and to prepare matters to be presented to it" (S. Tr. 50). The court of appeals' requirement that the grand jury *itself* issue the subpoena and that it be returnable on a date when the grand jury is in session therefore would be unnecessarily time-consuming and (particularly in districts where the grand jury meets infrequently and its sessions are of brief duration) difficult to arrange. See *Martin* v. *Beto*, 397 F.2d 741, 745 (C.A. 5), certiorari denied, 394 U.S. 906;

[16] Rule 17(a) provides, in pertinent part:

> A subpoena shall be issued by the *clerk* under the seal of the court * * *, signed and sealed but otherwise *in blank* to a party requesting it * * *. [Emphasis supplied.]

United States v. *Kleen Laundry & Cleaners, Inc.*, 381 F. Supp. 519, 521 (E.D. N.Y.).

The court of appeals' alternative requirement that the court approve each subpoena prior to issuance would be cumbersome and wasteful of judicial resources. A subpoena, unlike a search warrant, is merely a request to produce documents. It does not constitute a governmental intrusion upon possession of property necessitating prior judicial scrutiny, since nothing is thereby taken from the subpoenaed party,[17] who may in any event obtain an order to quash the subpoena if production would be "unreasonable or oppressive" (Rule 17(c), Fed. R. Crim. P.; see also *United States* v. *Nixon*, No. 73-1766, decided July 24, 1974, slip op. 13), or contest the subpoena in a show cause hearing. *United States* v. *Ryan*, 402 U.S. 530, 533; *Cobbledick* v. *United States*, 309 U.S. 323.

To be sure, the power to subpoena bank records without the necessity of obtaining prior judicial approval of each subpoena may on occasion be abused. But as this Court recently observed with regard to a similar potential for abuse in the issuance of Internal Revenue Service summonses, " '[t]hat the power may be abused is no ground for denying its existence. It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cog-

[17] See *Oklahoma Press Publishing Company* v. *Walling*, 327 U.S. 186, 208-209; *United States* v. *Birrell*, 242 F. Supp. 191, 204 (S.D. N.Y.); *Application of Kelly*, 19 F.R.D. 269 (S.D. N.Y.).

nizable in the courts.' " *United States* v. *Bisceglia*, No. 73-1245, decided February 19, 1975, slip op. 10 (citations omitted).

Here, there is no reason to infer that the prosecuting attorney abused the grand jury subpoena process. The subpoenaed records clearly were sought in connection with a specific investigation, which in fact resulted in an indictment by the grand jury. The subpoenas designated the records with reasonable particularity;[18] they identified respondent, his home and business addresses, and the precise dates at issue (October 1, 1972-January 23, 1973).[19] Indeed, the subpoenas were far more specific than an Internal Revenue Service "John Doe" summons to discover the identity of a person who has had bank transactions suggesting possible liability for unpaid taxes. *United States* v. *Bisceglia*, *supra*. The court of appeals did not deny that, at the time the subpoenas were issued, there was substantial basis for the belief both that respondent was involved in the offense under investigation and that these bank records might contain important evidence of the illegal activities.

[18] See, *e.g.*, *United States* v. *Olin Mathieson Chemical Corporation*, 36 F.R.D. 18 (S.D. N.Y.); *In re Subpoena Duces Tecum, Etc.*, 203 F. Supp. 575, 578 (S.D. N.Y.); *People* v. *Dorr*, 47 Ill. 2d 458, 265 N.E. 2d 601; cf. *Hale* v. *Henkel*, 201 U.S. 43.

[19] The subpoenas, presented on January 23, 1973, requested records of respondent's accounts "from October 1, 1972, through the present date" (App. A, *infra*, p. 11a).

Moreover, a grand jury may reasonably subpoena evidence "merely on suspicion that the law is being violated or even just because [the grand jury] wants assurance that it is not," *United States* v. *Bisceglia*, *supra*, slip op. at 7, relying upon *United States* v. *Powell*, 379 U.S. 48 and *United States* v. *Morton Salt Co.*, 338 U.S. 632. Indeed, if the grand jury investigation is to be meaningful, "[s]ome exploration or fishing necessarily is inherent and entitled to exist in all documentary productions sought by a grand jury." *Schwimmer* v. *United States*, 232 F.2d 855, 862-863 (C.A. 8).[20]

3. Even if the subpoenas, as issued, were defective and violative of respondent's Fourth Amendment rights, it does not follow that the proper remedy is "a new trial free from the taint of evidence improperly acquired" (App. A, *infra*, p. 16a). The exclusionary rule is generally "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Exclusion of this evidence, however, would serve no deterrent purpose and would merely waste judicial resources, since the excluded bank records presumably may be reacquired pursuant to validly issued trial subpoenas, and evidence derived therefrom reintroduced under the "independent source" doctrine of *Wong Sun* v. *United States*, 371

[20] As this Court stated in *Branzburg* v. *Hayes*, 408 U.S. 665, 701: "A grand jury investigation 'is not fully carried out until every available clue has been run down * * * to find if a crime has been committed'" (citations omitted).

U.S. 471, 488. Cf. *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, 392.[21]

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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MARCH 1975.

[21] The court of appeals did not address the question whether this evidence, even though held to have been improperly obtained in connection with the prior trial, could now be lawfully obtained through regular process acceptable in form to the court of appeals. If there is to be a new trial, considerations of judicial economy would appear to call for some consideration of this question at the present time.

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 73-2405

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Sept. 13, 1974

Three defendants were convicted before the United States District Court for the Middle District of Georgia, Wilbur D. Owens, Jr., J., of conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits. Additionally, two of the three defendants were also convicted of possession of an unregistered still, carrying on the business of distillers without giving bond with intent to defraud the United States of the whiskey tax and possession of non-tax-paid whiskey. Appeals were taken. The Court of Appeals, Goldberg, Circuit Judge, held that copies of telephone bills were admissible under the Business Records Act; that denial of two defendants' motions to discover results of fingerprint and handwriting analyses conducted by government experts was not prejudicial; that obtaining copies of one defendant's bank checks by means of faulty subpoenas duces tecum constituted an un-

lawful invasion of his privacy and evidence so obtained should have been suppressed; that evidence of another defendant's prior conviction of possession of non-tax-paid whiskey was inadmissible; and that evidence sustained conviction of third defendant.

Affirmed in part, reversed in part and remanded.

Appeal from the United States District Court for the Middle District of Georgia.

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

GOLDBERG, Circuit Judge:

On January 9, 1973, a fire broke out at the Southeastern Metal Company warehouse in Kathleen, Georgia. When officials of the Houston County Sheriff's Department and volunteer fire department arrived to fight the blaze, they discovered in the building a 7500 gallon-capacity distillery, some 175 gallons of non-tax-paid whiskey, and related paraphernalia. With this discovery the lush dreams of bourbon living that the still owners must have harbored were suddenly scotched.

Although no arrests were made at that time, five persons—Mitchell Miller, John Henry McDuffie, Susan McDuffie Weeks, Joseph Kenneth Brooks, and Terry Lee Smith—were subsequently charged with conspiracy to defraud the United States of tax revenues by the manufacture and possession of distilled spirits. In addition, all of the alleged co-conspirators

except Weeks were charged with substantive counts of possession of an unregistered still, carrying on the business of distillers without giving bond and with intent to defraud the United States of the whiskey tax, and possession of 175 gallons of non-tax-paid whiskey. Prior to trial the charges against Smith were dismissed, and the court granted Brooks' motion for severance.[1]

The trial of defendants Miller, McDuffie, and Weeks began on April 23, 1973, and ended in a mistrial on May 1, 1973. A second trial commenced on May 7, 1973, resulting in conviction of all three defendants on all charges. Miller and McDuffie were sentenced to three years imprisonment; Weeks received five years probation.

On this appeal defendants urge ten separate grounds for reversing their convictions. Only one issue is common to all three defendants, and one argument is made by both McDuffie and Weeks; in addition, Miller argues five alleged trial court errors; McDuffie, two; and Weeks, one.

I. ISSUES RAISED BY MORE THAN ONE DEFENDANT

A. *The Business Records Act.* The one contention shared by all three defendants is that the district

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[1] Brooks subsequently entered a plea of guilty to one count of the indictment and was sentenced to 5 years probation with supervision. The remaining counts against Brooks were dismissed.

court erred by admitting into evidence copies of customers' phone bills without proper foundation under the Business Records Act, 28 U.S.C. § 1732,[2] and

[2] § 1732. *Record made in regular course of business; photographic copies*

(a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.

The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

(b) If any business, institution, member of a profession or calling, or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence, or event, and in the regular course of business has caused any or all of the same to be recorded, copied, or reproduced by any photographic, photostatic, microfilm, micro-card, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is required by law. Such reproduction, when satisfactorily identified, is as admissible in evidence as the original itself in any judicial or administrative proceeding whether the original is in existence or not and an

without the necessary showing of trustworthiness. The thrust of defendants' objection is that the items should not have been admitted because: 1) they were not prepared under the supervision of the witnesses who testified as to their authenticity; and 2) they were copies of bills made up monthly from records and not contemporaneously with the transaction, and thus did not constitute the best evidence of the matters reflected thereon.

[1] In view of the purpose and plain meaning of section 1732, we find defendants' arguments unpersuasive. The statute explicitly establishes the admissibility of "any writing or record . . . if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record . . . ." In Sabatino v. Curtiss National Bank of Miami Springs, 5 Cir. 1969, 415 F.2d 632, this Court reviewed cases in which items offered under the Business Records Act had been excluded. We concluded that the statute's primary purpose was "to provide a check on trustworthiness," and that records should be admitted if three conditions are met:

(1) the records must be kept pursuant to some routine *procedure* designed to assure their ac-

enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement, or facsimile does not preclude admission of the original. This subsection shall not be construed to exclude from evidence any document or copy thereof which is otherwise admissible under the rules of evidence.

> curacy, (2) they must be created for *motives* that would tend to assure accuracy (preparation for litigation, for example, is not such a motive), and (3) they must not themselves be mere cumulations of hearsay or uninformed opinion.

415 F.2d at 637. The type of telephone toll records introduced in the trial below clearly meet section 1732 standards. *See* United States v. Mirenda, 9 Cir. 1971, 443 F.2d 1351, 1357; *cf.* United States v. Covello, 2 Cir. 1969, 410 F.2d 536, 542, cert. denied, 396 U.S. 879, 90 S.Ct. 150, 24 L.Ed.2d 136.

[2, 3] We have often noted that the trial court has a broad zone of discretion in determining the admissibility of documents such as business records, and that the court's rulings should be disturbed only when that discretion has been abused. *E.g.*, United States v. Middlebrooks, 5 Cir. 1970, 431 F.2d 299, 302, cert. denied, 1971, 400 U.S. 1009, 91 S.Ct. 569, 27 L.Ed.2d 622. Defendants contend that the telephone records were rendered inadmissible because the witnesses whose testimony laid the foundation for receipt of these items were not the persons who kept the records. This contention is not supported by the statute and is directly contradicted by the weight of judicial authority. "[T]he person who actually keeps the books and records and makes the entries need not testify if a person does testify who is in a position to attest to the authenticity of the records." United States v. Dawson, 2 Cir. 1968, 400 F.2d 194, 199. Indeed, section 1732 was adopted in part to eliminate the requirement that the entrant

appear to authenticate the record. United States v. Anderson, 8 Cir. 1971, 447 F.2d 833, 839; United States v. Re, 2 Cir. 1964, 336 F.2d 306, 314, cert. denied, 379 U.S. 904, 85 S.Ct. 188, 13 L.Ed.2d 177. Three telephone company employees testified that the government exhibits in question were copies of customer bills and company records, were kept in the ordinary course of business, and were made at or near the time of the transactions reflected on them. That testimony was clearly sufficient to justify admitting the records.

[4] Defendants' argument that these records were not the best evidence is similarly without merit. The best evidence rule has repeatedly been held inapplicable to records admitted under the Business Records Act. United States v. Anderson, *supra*; United States v. Vandersee, 3 Cir. 1960, 279 F.2d 176, 180; United States v. Kimmel, 2 Cir. 1960, 274 F.2d 54, 57.

[5] The telephone records in question were clearly admissible under the three prongs of the *Sabatino* test. First, in each instance they were records kept in the regular course of business on a routine basis designed to assure their accuracy. Second, the purpose for keeping the records was not to prepare for litigation but to assure accurate billing of customers. Third, they were not mere cumulations of hearsay or informal opinion, but they were made at or near the time of the transactions reflected in them. We therefore hold that the district court did not abuse

its discretion in admitting the telephone toll records into evidence.

B. *Discovery.* Weeks and McDuffie also claim that the trial court improperly denied their motions under Rule 16(a), Federal Rules of Criminal Procedure, to discover the results of fingerprint and handwriting analyses conducted by government experts. Defendants argue that Rule 16(a) should be broadly construed and that the district court should be given only limited discretion to deny a proper motion for discovery. Professor Wright has found support for this view by comparing Rule 16(a) with Rule 16(b):

> Since a specified showing [of materiality] is required under (b), but not under (a), the plain inference is that no showing is required for discovery under (a), and that while that subdivision is cast in discretionary terms it gives the defendant "virtually an absolute right" to discovery of the materials there listed. The nature of the materials covered by subdivision (a), and the strong interest of the defendant in having access to them, justifies such discovery as a matter of right.

1 C. Wright, Federal Practice and Procedure, Criminal § 253, pp. 500-01.

[6] Although this Court has approved a standard similar to that suggested by Professor Wright, *see* United States v. White, 5 Cir. 1971, 450 F.2d 264, 267-268, we have also adhered to the rule that "an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant." United States v. Saitta, 5 Cir. 1971, 443 F.2d 830, 831; Fed.R.Crim.P., Rule 52(a). We are satisfied that, on the peculiar facts of the present case, no prejudice to defendants could have resulted from the denial of their motion for discovery.

In the first place, as partial grounds for denial of the motion, the trial judge acknowledged that in open court the government had offered defendants access to the handwriting and fingerprint evidence. The record gives no indication that the government withdrew its offer or declined to make the information available. Moreover, all of the evidence in question was introduced at the first trial; defendants have brought this appeal from the second trial. Thus, the first trial itself provided disclosure not only of the contents of the reports, but also of the substance of the experts' testimony. As a result of this combination of circumstances, any error in denying motions for discovery was rendered harmless by the time of the second trial.

II. MITCHELL MILLER

In addition to his Business Records Act claim, defendant Miller makes five assignments of error on this appeal: (1) the trial court erred by admitting microfilm copies of Miller's bank checks obtained by means of an illegal grand jury subpoena duces tecum; (2) the trial court erred by overruling, on the ground of lack of standing, Miller's motion to suppress evi-

dence from a Pepsico rental truck; (3) the trial court abused its discretion by denying Miller's motion for continuance; (4) the trial court abused its discretion by denying Miller's motion for severance; (5) the trial court erred in denying Miller's motion for directed verdict of acquittal as to Counts 2, 3 and 5.

A. *The "Grand Jury" Subpoena.* Miller's objection to the introduction of microfilm copies of his bank checks rests on two separate but related contentions. First, relying primarily on the three-judge district court decision in Stark v. Connally, N.D.Cal. 1972, 347 F.Supp. 1242, Miller asserts that provisions of the Bank Secrecy Act of 1970 requiring banks to microfilm all checks passing through them constitute a violation of depositors' Fourth Amendment rights to be free from unreasonable searches and seizures. Second, Miller claims that the subpoenas used to obtain the microfilm copies here were illegal because they were issued by the United States Attorney rather than by the court, because no return was made upon the subpoenas to the court, and because the subpoenas were issued for a date when the grand jury was not in session.

[7, 8] Miller's argument that the Bank Secrecy Act is unconstitutional is now foreclosed by the Supreme Court's recent decision in California Bankers Ass'n v. Shultz, 1974, —— U.S. ——, 94 S.Ct. 1494, 39 L.Ed.2d 812, reversing in part Stark v. Connally, *supra*. However, in view of the long recognized inclusion of private papers and records within the scope of Fourth Amendment protections, reinforced

by the Court's reasoning in *California Bankers*, we hold that obtaining copies of Miller's bank checks by means of a faulty subpoena duces tecum constituted an unlawful invasion of Miller's privacy, and that any evidence so obtained should have been suppressed.

On January 23, 1973, agents of the government's Alcohol, Tobacco & Firearms (ATF) Unit presented to Barry Jones, President of Citizens and Southern National Bank, Warner Robins, Georgia, and to Harold Peavey, President of the Bank of Byron, Byron, Georgia, purported grand jury subpoenas duces tecum requiring them to appear in the United States District Court for the Middle District of Georgia at 9:00 a.m., on January 24, 1973. The subpoenas commanded the recipients to produce

> all records of accounts, *i. e.*, savings, checking, loan or otherwise, in the name of Mr. Mitch Miller, 3859 Mathis Street, Macon, Ga. and/or Mitch Miller, Associates, 100 Executive Terrace, Warner Robins, Ga., from October 1, 1972, through the present date.

Defendant Miller was not advised that these subpoenas had been served. After the banks supplied the requested documents to the ATF agents, Jones and Peavey were advised that they would not need to appear at the January 24 grand jury session. In fact, the grand jury did not meet on January 24; their next meeting was on February 12, nearly three weeks later.

At the suppression hearing ATF Agent Powell testified that he viewed microfilm copies of all checks

on Miller's account at the Bank of Byron and took copies of one deposit slip and one or two checks. At the Citizens and Southern Bank Agent Powell received copies of all of Miller's checks for the period covered by the subpoena except for two that would not print. The prosecution introduced several of these copies into evidence at trial, using them to help establish at least three of the overt acts charged against Miller in furtherance of the conspiracy.

Both Jones and Peavey entered stipulated testimony that their banks kept microfilm copies of customers' accounts and of personal checks paid through those accounts "in compliance with Treasury and Banking Regulations issued under the Bank Secrecy Act." [3] The Citizens and Southern Bank had not

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[3] Record, Vol. I, pp. 73, 76. The pertinent section of the Bank Secrecy Act, 12 U.S.C. § 1829b(d), provides:

> (d) Each insured bank shall make, to the extent that the regulations of the Secretary so require—
>
> (1) a microfilm or other reproduction of each check, draft, or similar instrument drawn on it and presented to it for payment; and
>
> (2) a record of each check, draft, or similar instrument received by it for deposit or collection, together with an identification of the party for whose account it is to be deposited or collected, unless the bank has already made a record of the party's identity pursuant to subsection (c) of this section.

The regulations promulgated pursuant to section 1829b(d) essentially require that each bank retain either the original or a copy of each check, draft, or money order in excess of $100 drawn on the bank or issued and payable by it. 31 C.F.R. § 103.34(b)(3) (1973). Such records must be retained for a period of five years. 31 C.F.R. § 103.36(c) (1973).

maintained complete microfilm check records prior to the effective date of the regulations (Record, Vol. II, pp. 35-36); the trial transcript does not reflect whether the Bank of Byron had previously kept such records.

As we have noted, the Supreme Court's decision in California Bankers Ass'n v. Shultz, *supra*, disposes of Miller's challenge to the constitutionality of the recordkeeping requirements of the Bank Secrecy Act. That decision, however, did not place the judicial stamp of approval upon every prosecutorial tactic for obtaining records compiled under the requirements of the Act.

[9] The Supreme Court determined almost 90 years ago that "a compulsory production of a man's private papers to establish a criminal charge against him . . . is within the scope of the fourth amendment . . . ." Boyd v. United States, 1886, 116 U.S. 616, 622, 6 S.Ct. 524, 528, 29 L.Ed. 746. The venerable *Boyd* doctrine still retains its vitality; [4] the government may not cavalierly circumvent *Boyd's* precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies. In upholding the Bank Secrecy Act the divided *California Bankers* Court determined that

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[4] *Boyd* was recently cited as the "fountainhead case" in the establishment of privacy as a fundamental value protected by the Bill of Rights. Roe v. Wade, 1973, 410 U.S. 113, 209 n. 2, 93 S.Ct. 705, 35 L.Ed.2d 147 (Douglas, J. concurring).

the government could take the first of those steps without exceeding constitutional limits. The Court, however, did not choose to abandon 90 years of precedent by proclaiming open season on personal bank records. Indeed, in rejecting the Fourth Amendment claims of bank depositor plaintiffs, the *California Bankers* majority, in an opinion by Justice Rehnquist, relied heavily upon the proposition that depositors have adequate legal protection from improper government access to their records:

> We see nothing in the Act which violates the Fourth Amendment rights of any of these plaintiffs. Neither the provisions of Title I [Recordkeeping Requirements] nor the implementing regulations require that any information contained in the records be disclosed to the Government; both the legislative history and the regulations make specific reference to the fact that access to the records is to be controlled by existing legal process.

—— U.S. at ——, 94 S.Ct. at 1513, 39 L.Ed.2d at 835.[5] Surely a purported grand jury subpoena, is-

[5] *See* 31 C.F.R. § 103.51 (1973). The Report of the House Committee on Banking and Currency states:

> It should be borne in mind that records to be maintained pursuant to the regulations of the Secretary of the Treasury will not be made automatically available for law enforcement purposes. They can only be obtained through existing legal process.

H.Rep. No. 91-975, 91st Cong., 2d Sess., 5 (1970); 2 U.S. Code Cong. & Admin. News 4395 (1970). *See also*, S.Rep. No. 91-1139, 91st Cong., 2d Sess., 10 (1970).

sued not by the court or by the grand jury, but by the United States Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient "legal process" within the meaning of the majority opinion.[6]

[6] A separate opinion filed by two members of the six Justice majority in the *California Bankers* case provides additional support for this proposition. Justice Powell, for himself and Justice Blackmun, joined the majority opinion, but entered a separate concurring opinion to note his concern over the scope of the reporting provisions of the Act, which confer broad authority on the Secretary of the Treasury to require financial institutions to file reports of domestic monetary transactions. Limiting his approval of these requirements to the boundaries of the current implementing regulations—transactions in currency of more than $10,000, 31 C.F.R. § 103.22 (1973)—Justice Powell warned that significant extension of the government's power to compel disclosure of financial transactions would pose substantial constitutional difficulties:

> Financial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy. Moreover, the potential for abuse is particularly acute where, as here, the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

—— U.S. at ——, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-851 (Powell, J., concurring). A governmental order to disclose copies of a bank depositor's checks is at least as obnoxious to constitutional principles when exercised, as here, without

[10] It is no answer to argue, as does the government on this appeal, that bank officials cooperated fully and without objection; for he whose rights are threatened by the improper disclosure here was a bank depositor, not a bank official, and depositors as well as banks must be accorded the protection of "legal process." *See* Donaldson v. United States, 1971, 400 U.S. 517, 537, 91 S.Ct. 534, 27 L.Ed.2d 580 (Douglas, J., concurring); United States v. Kordel, 1970, 397 U.S. 1, 7, 90 S.Ct. 763, 25 L.Ed.2d 1. The trial court should not have admitted into evidence copies of Miller's bank checks or any evidence resulting from investigative leads provided by information from those checks. Without attempting to chart any future course to be followed to validly obtain such evidence, we now hold that defendant Miller is entitled to a new trial free from the taint of evidence improperly acquired.

B. *Standing to Challenge the Search of the Pepsico Van.* Defendant Miller raises one other very troublesome issue on this appeal. He argues that the trial court improperly overruled, on the basis of lack of standing, his motion to suppress distillery apparatus and raw material seized from a Pepsico rental truck. On the basis of information supplied by an informant that a "blue van type truck . . . would be picking up some kind of illegal stuff to manufacture liquor," Deputy Sheriff Burnham stopped a Pepsico truck,

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sanction in statute or regulation as it would be under authority of an extended legislative scheme.

which was occupied by Joseph Brooks and Terry Lee Smith.[7] When Brooks and Smith were unable to produce a key to the back of the van, Deputy Burnham took them and the truck to the county jail, obtained a search warrant, and searched the truck; the search revealed cylinders of bottled gas, a shotgun condenser, two 100 pound bags of wheat shorts, a cap, and 150 five gallon plastic jugs. Defendants Miller, Weeks, and McDuffie all filed motions to suppress the evidence obtained from the Pepsico truck.[8] On April 19, 1973, the district court granted those motions, declaring that:

> the affidavit in question and the resulting search warrant does [sic] not meet the minimum requirements of the laws of the State of Georgia, Georgia Law 1966, pp. 567-568, as informally codified in Ga.Code Ann. 27-303, and the constitutional requirements as interpreted by the Supreme Court of the United States in the cases of Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509; Spinelli v. United States, 393 U.S. 410, 21 L.Ed.2d 637, 89 S.Ct. 584, and United States v. Harris, 403 U.S. 573, 29 L.Ed. 2d 723, 91 S.Ct. 2075, in that said affidavit, among other things, does not contain information in any way sufficient to demonstrate that the Justice of the Peace who issued the search warrant in question was afforded information by which the Justice of the Peace had the oppor-

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[7] *See* footnote 1 *supra* & accompanying text.

[8] The record is unclear as to whether Brooks and Smith filed motions to suppress.

> tunity to independently judge the sufficiency of the information furnished by the informer to the Deputy Sheriff. (Record, Vol. I, pp. 78-79).

On the morning the first trial began, the government moved the court to reconsider its order granting defendants' motions to suppress, claiming that defendants Miller, McDuffie, and Weeks lacked "the requisite standing to challenge the illegal search" because they "were neither in the vehicle nor owners of, nor claimants of an interest in the vehicle or the object seized therefrom." (Record, Vol. I, pp. 91, 93-94). The court granted the government's motion and permitted the evidence to be introduced at trial.

In his motion to suppress, defendant Miller stated that he "believes that the Government will attempt to prove either the purchase of or ownership by him of the above described vehicle." (Record, Vol. I, p. 34). The conspiracy count of the original indictment, in Overt Act #9, charged that Miller had purchased the Pepsico van in question on November 22, 1972, from Dixie Truck and Parts Company and that Miller had indicated that the purchase was for Trans Aero Corporation. In order to defeat Miller's standing to challenge the search of the van, the government agreed to have Overt Act #9 deleted from the indictment. At the hearing on the government's motion to reconsider the suppression order, the prosecution took the position that the corporation, not Miller, owned the truck. By arrangement of its evidence at the second trial, however, the government sought to show that Miller exercised control over the

use of the van and that the purchase in the name of the corporation was merely a straw purchase by Miller. Other than his allegation that "the Government will attempt to prove . . . ownership," Miller made no claim, either before or during the trial, that he owned the van.

The facts of this case pose the question left unanswered by Brown v. United States, 1973, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208, the Supreme Court's most recent ruling on the requirements for standing to challenge a search, and by *Brown's* gloss on the Court's earlier decision in Jones v. United States, 1960, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697. In *Brown* the Court held that, at least when prosecutorial self-contradiction is not a factor,

> there is no standing to contest a search and seizure where . . . the defendants: (a) were not on the premises at the time of the contested search and seizure; (b) alleged no proprietary or possessory interest in the premises; and (c) were not charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

411 U.S. at 229, 93 S.Ct. at 1569. Miller alleged, not that he had a proprietary or possessory interest in the premises, but that the government would attempt to prove such an interest; and Miller cannot claim standing on the basis of either standard (a) or standard (c). Therefore, absent the element of prosecutorial self-contradiction in the present case,

Miller would not be able to challenge the search and seizure of the van.

The Court's earlier *Jones* decision, however, clearly deemed that missing element to be a critical factor:

> [T]o hold that petitioner's failure to acknowledge interest in the narcotics or the premises prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. . . . The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government.

362 U.S. at 263-264, 80 S.Ct. at 732.[9]

The self-contradictory prosecutorial conduct in the present case is within the ambit of the reasoning, if not the strict holding, in *Jones*. The Court in *Brown*, however, viewing *Jones* through the prism of the intervening case of Simmons v. United States,[10] left

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[9] Although in the case *sub judice* ownership of the truck was not an essential element of the offense charged and Miller's proprietary or possessory interest would not have been lawless *per se*, the government obviously considered Miller's ownership and control over the van to be quite important in establishing his connection with the conspiracy. The distinction clearly does not render the government's trial and pre-trial positions any less contradictory.

[10] 1968, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247. In *Simmons* the Court held that, when a defendant makes statements in a pretrial hearing to establish standing to challenge a search, that testimony may not be used against the defendant at trial. According to the *Brown* Court, *Simmons* removed the most dangerous aspects of the self-incrimination element from the *Jones* equation.

open the question of whether standing is conferred as a matter of course, even absent any of the three stated indicia, when prosecutorial self-contradiction is demonstrated:

> [W]e do not decide that this vice of prosecutorial self-contradiction warrants the continued survival of *Jones*' "automatic" standing now that our decision in *Simmons* has removed the danger of coerced self-incrimination. We simply see no reason to afford such "automatic" standing where, as here, [there was no] risk to a defendant of either self-incrimination or prosecutorial self-contradiction.

Brown v. United States, *supra*, 411 U.S. at 229, 93 S.Ct. at 1569.

Given the posture of the case *sub judice*, we also may defer a decision as to whether the government's duplicitous tactics were sufficient to confer standing upon defendant Miller. Miller is entitled to a new trial because of the trial court's error in admitting copies of his bank checks into evidence. *See* Part II A, *supra*. At his new trial Miller may choose to assert his proprietary interest at the suppression hearing. He would thereby establish, under standard (b) of the *Brown* test, his standing to challenge the search of the van, and would obviate any need for

this Court to decide what follows *Jones* and *Brown* in this troublesome area of criminal procedure.

[11] C. *Continuance, Severance, and Insufficient Evidence.* After careful consideration of the record on appeal and the arguments of the parties, we find no merit in Miller's remaining assignments of error. The trial court did not abuse its discretion by denying Miller's motions for continuance [11] and for severance. *See, e. g.*, Ungar v. Sarafite, 1964, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (continuance); McKinney v. Wainwright, 5 Cir. 1974, 488 F.2d 28, cert. denied, —— U.S. ——, 94 S.Ct. 1998, 40 L.Ed. 2d 562 (continuance); Leach v. United States, 5 Cir. 1968, 402 F.2d 268, cert. denied, 1969, 393 U.S. 1082, 89 S.Ct. 864, 21 L.Ed.2d 775 (severance). Finally, we conclude that there was sufficient evidence for the district judge to submit to the jury the questions of defendant Miller's guilt or innocence of possessing an unregistered distillery (Count 2), carrying on the business of a distiller without giving bond (Count 3), and possessing non-tax-paid whiskey (Count 5).

[11] Miller's motion for continuance prior to the second trial was based on his assertion that pretrial publicity and erroneous news reports about testimony and evidence at the first trial would have prevented him from receiving a fair trial before an impartial jury at that time. The second trial was scheduled to begin only six days after the first had ended in a mistrial. Our independent review of the record has revealed neither inherently prejudicial publicity, Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, nor actual prejudice on the jury panel, Hale v. United States, 5 Cir. 1970, 435 F.2d 737.

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin v. Dowd, 1961, 366 U.S. 717, 722-723, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751; Hale v. United States, *supra*, 435 F.2d at 745-746.

III. JOHN HENRY McDUFFIE

[12, 13] In addition to his Business Records Act claim [12] and his discovery claim,[13] defendant John Henry McDuffie makes two assignments of error on this appeal: 1) that the trial court erred by refusing to allow McDuffie to introduce evidence as to the existence of an illicit distillery not connected with other evidence in the case; and 2) that the trial court erred by admitting evidence of McDuffie's prior indictment and guilty plea for possession of non-tax-paid whiskey. We find no merit in the first claim. We conclude, however, that defendant McDuffie must be granted a new trial because the introduction of

[12] *See* Part I A, *supra*.

[13] *See* Part I B, *supra*.

evidence of his prior offense violated the "universal rule . . . that evidence of the commission of a wholly separate and independent crime is not admissible as a part of the case against the defendant." 2 C. Wright, Federal Practice and Procedure, Criminal § 410, at 123.

This Court has, of course, recognized a number of exceptions to the "universal rule." In the present case the government urges that McDuffie's prior conviction for possession of non-tax-paid whiskey was properly admitted under the "intent" exception. The Fifth Circuit has indeed held that, in certain cases,

> evidence of other offenses by the accused is admissible to show his criminal intent as to the offense charged, where the other offenses are similar to and not too remote from that charged, and where intent is in issue as an element of the offense charged.

Weiss v. United States, 5 Cir. 1941, 122 F.2d 675, 682, cert. denied, 314 U.S. 687, 62 S.Ct. 300, 86 L.Ed. 550. The government's rationale, and the one apparently adopted by the court below, is that because evidence of other crimes may be introduced to show intent, because intent is an element in at least two counts of the indictment against McDuffie, and because both the prior crime and the presently alleged offenses involve moonshine whiskey, the earlier conviction must be admissible. (*See* Record, Vol. III, pp. 286-298—in chambers discussion among court and counsel on government's offer of prior crime evidence).

That analysis, however, fails to take into account the constancy with which this Court has adhered to the view that the "universal rule" against admitting evidence of other crimes is a just and wise rule, and that the exceptions to that principle, each of which has been carved out to serve a limited prosecutorial and judicial purpose, should not be permitted to swallow the rule.[14] Pursuant to that view we have adopted a balancing approach, most recently articulated in United States v. Goodwin, 5 Cir. 1974, 492 F.2d 1141, 1150:

> Assuming, of course, that the evidence of other crimes is clear and convincing, we must balance the actual need for that evidence in view of the contested issues and the other evidence available to the prosecution, and the strength of the evidence in proving the issue, against the danger that the jury will be inflamed by the evidence to decide that because the accused was the perpetrator of the other crimes, he probably committed the crime for which he is on trial as well.

See also, United States v. Lawrance, 5 Cir. 1973, 480 F.2d 688, 691-692 n. 6; United States v. Johnson, 5

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[14] As Dean McCormick warned,

> [i]f the judges, trial and appellate, content themselves with merely determining whether the particular evidence of other crimes does or does not fit in one of the approved classes, they may lose sight of the underlying policy of protecting the accused against unfair prejudice. The policy may evaporate through the interstices of the classification.

C. McCormick, Evidence § 190, at 453 (2d ed. 1954).

Cir. 1972, 453 F.2d 1195, 1199; United States v. Boyd, 5 Cir. 1971, 446 F.2d 1267, 1270-1271. The trial record reveals that virtually no consideration was given to any of the crucial elements in the balancing process—the government's actual need for the evidence, the probative value of the evidence, or the potential prejudice to the accused.

Our own examination of the relevant factors indicates that the evidence in question ought to have been excluded. The government argues that intent to defraud the United States of the tax on distilled spirits is the element of Count 1 (conspiracy) and Count 4 (carrying on the business of distiller of spiritous liquors) that justifies admitting McDuffie's prior conviction. We cannot agree. As to establishing that type of intent, we see no probative value whatsoever in defendant's earlier conviction of possession of non-tax-paid whiskey, a crime which requires no such intent. *See* Hamilton v. United States, 5 Cir. 1969, 409 F.2d 928, 930; McClain v. United States, 5 Cir. 1955, 224 F.2d 522, 525. The government urges vigorously that possession is one of the items in the count of conspiracy to defraud "by manufacturing, distilling, possessing, transporting, removing, depositing and concealing distilled spirits . . ."; but the trial record clearly demonstrates that the government's proof against McDuffie went primarily to conspiracy to manufacture and distill rather than conspiracy to possess. In any event, the conduct involved in simple possession of illicit whiskey has precious little to do with the state of mind involved

in conspiracy with intent to defraud or carrying on the business of a distiller with intent to defraud.

[14] Even if we were to assume that the prior conviction had some probative value in the present case, the government has done little to show any actual need for that evidence in view of other available evidence. Terry Lee Smith, the alleged co-conspirator, testified that McDuffie helped weld the still pots, helped mix the mash for fermentation, paid Smith for work at the still, and furnished a condenser, a still cap, wheat shorts, and plastic containers to Smith to be carried to the Macon area. If the jury believed that McDuffie actually performed these acts, they logically would infer from that conduct that he possessed the requisite criminal intent. *See* Fallen v. United States, 5 Cir. 1955, 220 F.2d 946, 948, cert. denied, 350 U.S. 924, 76 S.Ct. 213, 100 L.Ed. 808.

In its brief on appeal the government lists several instances during McDuffie's trial testimony in which he offered innocent explanations for potentially suspicious acts (e. g., a fingerprint on a jug found at the still site and a $1500 check from McDuffie to Miller). The divergent explanations, however, would appear to relate more to actual participation in the conspiracy than to intent. Moreover, the thrust of McDuffie's defense was alibi, not lack of criminal purpose. Finally, the government's argument that McDuffie's testimony created a prosecutorial need to introduce prior crime evidence bears the stamp of disingenuousness, since the prior conviction was in-

troduced into evidence during the government's case-in-chief before McDuffie ever took the stand.

On the other side of the scale, although the trial court carefully instructed the jury to consider McDuffie's prior conviction only on the issue of intent, we believe there is a substantial possibility that such evidence could lead a jury to believe that the defendant is the type of person who engages in moonshining. And as Judge Rives has said: "Our law makes some allowance for the possibility of reform, and does not yet say 'once a moonshiner, always a moonshiner.'" Baker v. United States, 5 Cir. 1955, 227 F.2d 376, 378-379 (Rives, J., concurring).

[15] All that we demand of trial courts and litigants in this seemingly complex area of criminal jurisprudence is that they deal in reason, not categories. The treasured principles underlying the rule against admitting evidence of other crimes should be relaxed only when such evidence is genuinely needed and would be genuinely relevant.

> This Court has never hesitated to approve the admission of other-crime evidence when that evidence has been relevant under one of the exceptions to the general rule. We have recognized, however, and we must continue to recognize, that the various categories of exceptions—intent, design or plan, identity, etc.—are not magic passwords whose mere incantation will open wide the courtroom doors to whatever evidence may be offered in their names.

United States v. Goodwin, *supra*, 492 F.2d 1155.

IV. SUSAN McDUFFIE WEEKS

[16] In addition to her Business Records Act claim [15] and her discovery claim,[16] defendant Susan McDuffie Weeks contends that the government failed to offer sufficient evidence to support a conviction for conspiracy, and that the trial court therefore erred by denying her motions for judgment of acquittal. Having examined the record with great care, we concede that the issue is extremely close; but we conclude ultimately that the evidence was sufficient to go to the jury and that the trial court did not err by refusing to order a judgment of acquittal.

In analyzing the evidence against defendant Weeks, we begin with the oft-quoted standard set forth by the Supreme Court in Glasser v. United States, 1942, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680, 704:

> The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it. . . . Participation in a criminal conspiracy need not be proved by direct evidence; a common purpose and plan may be inferred from a "development and collocation of circumstances".

As in every case resting on circumstantial evidence it is unnecessary to find either the smoking pistol or the bottle of non-tax-paid whiskey in the hand of the defendant. This Court has held that, once a conspir-

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[15] *See* Part I A, *supra*.

[16] *See* Part I B, *supra*.

acy is established, the government need only show "slight evidence" that a particular person was a member of the conspiracy. United States v. Morado, 5 Cir. 1972, 454 F.2d 167, 175, cert. denied, 406 U.S. 917, 92 S.Ct. 1767, 32 L.Ed.2d 116; United States v. Warner, 5 Cir. 1971, 441 F.2d 821, 830, cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 58. As we cautioned in *Morado*, however,

> [o]ur adherence to the "slight evidence" rule should make us nonetheless insistent that guilt remain "individual and personal" and that the government show beyond a reasonable doubt that each and every alleged member of the conspiracy had the deliberate, knowing, specific intent to join the conspiracy.

454 F.2d at 175.

The government's evidence in the case *sub judice* clearly indicates that a conspiracy existed and that defendant Weeks performed acts whose effect was to further that conspiracy. Weeks' claim of insufficient evidence rests on the argument that the government failed to prove that she had knowledge of the conspiracy or that she intentionally acted to further its objectives, both of which are prerequisite to conviction. *See* Causey v. United States, 5 Cir. 1965, 352 F.2d 203, 207; Duke v. United States, 5 Cir. 1956, 233 F.2d 897, 901. Although we recognize that knowledge of a conspiracy is seldom capable of direct proof and must usually appear from surrounding circumstances, United States v. Martinez, 5 Cir.

1973, 486 F.2d 15, 24, we also demand that "the evidence of knowledge must be clear, not equivocal. . . . because charges of conspiracy are not to be made out by piling inference upon inference. . . ." Ingram v. United States, 1959, 360 U.S. 672, 680, 79 S.Ct. 1314, 1320, 3 L.Ed.2d 1503, *quoting* Direct Sales Co. v. United States, 1943, 319 U.S. 703, 711, 63 S.Ct. 1265, 87 L.Ed. 1674.

Defendant Weeks is the daughter of defendant McDuffie, and until late 1972 or early 1973 was employed as a secretary by defendant Miller in his business as a manufacturer's representative. Much of the government's evidence of Weeks' involvement in the conspiracy related to Weeks' activities in her secretarial capacity. First, the government introduced evidence to show that Weeks had rented a post office box at Kathleen, Georgia, in the name of John Carroll, Vice President, Trans Aero Corporation. (Defendant Miller allegedly had used Trans Aero as a cover for certain of his illicit operations). Weeks testified, however, that in renting the post office box at the direction of her employer, she was doing only what she had often done before as a courtesy for companies represented by Miller; she frequently signed the names of corporations and their officers in connection with her work. Weeks made no effort to conceal her identity when she rented the box; she followed her signing of John Carroll's name with the word "by" and her initials.

The government also showed that Weeks had arranged with Flint Electric Company to have elec-

tricity turned on, in the name of Trans Aero Corporation, at the Kathleen, Georgia warehouse where the distillery was later discovered. Weeks noted that she had had electricity connected on several previous occasions at Miller's direction, that she again accompanied the corporate signature with her own initials, and that she was well known at Flint Electric, where she regularly paid her own electric bills in person.

In addition, evidence was presented which established that Weeks had partially filled out money orders to Walter Puhan, the owner of the property on which the still was found, and that those money orders bore notations indicating that they were in payment for the Kathleen, Georgia warehouse for specified periods of time. Weeks gave uncontradicted testimony, however, that Miller customarily placed bills on her desk with checks or money orders attached for her to fill out.

The government also offered evidence that Weeks had a citizens' band radio antenna on her house similar to one found at the location of the illicit still twelve miles from Weeks' home. No evidence was introduced, however, to indicate that her antenna was connected to radio equipment; moreover a representative of the distributing company testified that such radios could not be used for private conversations and that the average antenna range was only five miles. The government also introduced telephone company records to establish that numerous toll calls had been made between Weeks' residence and defendant McDuffie's residence, a situation not difficult to

understand in view of the parent-child relationship, and particularly at a time when daughter Weeks (at that time, Susan McDuffie) was planning her wedding.

If the evidence thus far described had been the only information adduced at trial, we would be compelled to conclude that the jury *must* have entertained a reasonable doubt as to Weeks' knowledge of the conspiracy. None of that evidence is inconsistent with the hypothesis urged by Weeks that she was acting innocently in her capacity as McDuffie's daughter and Miller's secretary.

Two final items of evidence, however, when considered together, demonstrated enough inconsistency in Weeks' theory to make the government's case strong enough to submit to the jury. First was the testimony of witness Henry McDowell, with whom Miller had discussed his distillery operations and from whom Miller sought to obtain large quantities of sugar and plastic jugs. Asked whether, in a meeting on January 2, 1973, Miller had given him any instructions as to how to contact him, McDowell replied:

> He told me if I would call his office and I had any information for him at all just to give it to his secretary, that there would be no problem, that she knew what was going on and just give her that information. (Record, Vol. III, p. 303).[17]

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[17] Weeks raised no objection, either at trial or on this appeal, to the introduction of McDowell's testimony; and the

Weeks argues that McDowell's testimony is meaningless as to her participation in the conspiracy, since she terminated her employment with Miller at Christmas of 1972, and the record is silent as to the identity of Miller's secretary on January 2, 1973.

A second piece of evidence, however, appears to cast doubt on Weeks' argument. Philip White, a handwriting expert, testified that, through a comparison of writing samples, he had determined that Weeks "probably" wrote[18] a money order sent to Walter Puhan (the owner of the still site property) on January 8, 1973. From this testimony the jury could reasonably have reached either of two damaging conclusions: 1) that Weeks had misstated the date of her termination as Miller's secretary and that she was in fact in Miller's employ on the date of Miller's incriminating comment to McDowell; or 2) that Weeks filled out money orders in furtherance of the illicit distillery operation, not as an innocent secretary, but even beyond her secretarial tenure as a knowing member of the conspiracy. In either case the jury could have decided that Weeks, if less than

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declarant, defendant Miller, took the stand and was available for cross-examination on this subject. Therefore, we need not consider whether the evidence fell within the confines of the federal co-conspirator exception to the hearsay rule.

[18] White stated that he had six categories of characterizations for handwriting comparisons: that the person who made the writing on A *made* the writing on B; *probably made* the writing on B; *could have made* the writing on B; *probably did not make* the writing on B; *did not make* the writing on B; or that White is *unable to determine* who made the writing on B.

a majordomo, was more than a cubicle secretary or an unsuspecting pawn.

We emphasize that we consider the government's case against Weeks to be far from overwhelming. In reading and analyzing the record, we found the barometric pressure of guilt rising and falling. As in all sufficiency of the evidence cases, our opinion is tied closely to its facts. Although we have not written an opinion for all seasons, or for all stills, we are satisfied that the jury could, on the basis of the government's evidence, have felt the wintry blast of Weeks' guilt beyond a reasonable doubt.

V. CONCLUSION

The judgment is affirmed as to defendant Weeks. As to defendants Miller and McDuffie, the judgments are reversed and the case remanded for further proceedings not inconsistent with this opinion.

Affirmed in part; reversed in part, and remanded for new trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1973

No. 73-2405

D. C. Docket No. CR 9035

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Georgia

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the

judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part; and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

September 13, 1974

Issued as Mandate:

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 73-2405

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

MITCHELL MILLER, SUSAN MCDUFFIE WEEKS, and JOHN HENRY MCDUFFIE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Middle District of Georgia

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Sept. 13, 1974, 5 Cir., 1974 —— F.2d ——)

(January 15, 1975)

Before GEWIN, GOLDBERG and CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing filed on behalf of Appellee (U.S.A.) is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

SIMPSON, Circuit Judge, joined by BROWN, Chief Judge, and BELL, AINSWORTH, DYER, RONEY and GEE, Circuit Judges, dissenting:

With deference, we here enter our vigorous dissent from the full court's failure, by a narrow 8-7 vote, to grant the Petition of the United States for Rehearing en Banc. Our dissent is dictated by two basic reasons.

In the first place, the panel opinion departs radically from prior decisions denying to bank customers the standing to challenge subpoenas of bank records of their accounts. We disagree with the panel holding that such a result is either required or supported by *California Bankers Association* v. *Schultz*, 1974, 416 U.S. 21, 94 S.Ct. 1494, 39 L.Ed.2d 812. Neither may the panel decision be justified under the copying and reporting requirements of the Bank Secrecy Act of 1970, 12 U.S.C., §§ 1829b, 1730d, 1951-59, and its implementing regulations, 31 C.F.R. § 103.34(b)(3) (1973) and 31 C.F.R. § 103.36 (1973). The panel opinion appears to be oblivious to the momentous change it would put in motion by its cursory treat-

ment of the question of standing and its bland assumption that the depositor-appellant Miller had standing here to attack the subpoenas duces tecum directed to the banks.

Secondly, if the presence of standing on the part of the depositor is assumed *arguendo*, and the merits of the panel decision are considered, we disagree that the process involved here was so infirm as to dictate reversal of the district court. Finding the process faulty, the panel reverses without determining whether the alleged error is of such a nature as to require reversal. The implication is that faulty process *per se* is reversible error. We do not at all agree that the process below was faulty, but assuming that it was, prejudice to the appellant from such defect was not shown to have resulted and hence reversal is not indicated.

The following facts emerge from the panel opinion and from the briefs of the parties before the panel and the petition for rehearing en banc of the United States.

The appellant Miller and four others were indicted for conspiracy to defraud the United States in connection with the manufacture and possession of non-tax-paid distilled spirits, 18 U.S.C. § 371 and 26 U.S.C. §§ 5601, et seq., and corresponding related substantive offenses. Miller was the hub of the conspiracy, its source of necessary operating funds, its guiding intelligence and the director of its operations. At a second trial, following a mistrial, he was convicted by a jury of conspiracy and of the three sub-

stantive charges for which he was tried. Concurrent three year confinement sentences were imposed on him. Miller's conviction is reversed for retrial by the panel decision.

The alleged trial error with which we are concerned on the Petition of the United States for Rehearing en Banc is the admission into evidence of microfilm copies of Miller's bank checks kept pursuant to the record-keeping provisions of the Bank Secrecy Act and obtained by grand jury subpoenas duces tecum directed to two banks at which he conducted banking business. On appeal, Miller challenged the legality of the subpoenas as not issued under the direction of the court, because no return was made on them, and because they were returnable to a date when the grand jury was not scehduled to be in session.[1] The two banks allowed inspection by revenue agents on the bank premises; the bank representatives were then relieved of any obligation to appear before the U. S. Attorney or before the grand jury.

The panel accorded to Miller the requisite standing to complain of the claimed illegality of the subpoenas duces tecum, and held that the subpoenas were fatally defective. The bank's waiver of defects was held not to bind the depositor Miller because of his

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[1] The subpoenas issued at the request of the United States Attorney on January 23, 1973 and ordered production of the bank records before the grand jury on January 24. The grand jury did not meet, however, until February 12.

protected interest in bank records kept pursuant to the Bank Secrecy Act and pertaining to his account.

The panel's grounds for this decision are unclear. Language in the opinion indicates both that the panel considered Miller to have an ownership interest and a cognizable privacy interest.[2] But the new interest is recognized in the customer in order to prevent the copying requirements of the Bank Secrecy Act from being used as a means of circumventing the protection accorded an individual's "private papers" by the Fourth Amendment. See *Boyd* v. *United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.[3] Once a protected right in the bank records is established, a depositor's standing follows.

Ruling *sub silentio* that a depositor has standing to challenge a grand jury subpoena of bank records

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[2] We note in this connection the panel's reliance upon *Boyd* v. *United States*, 1886, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746, dealing with the compulsory production of an individual's "private papers", and reference to "their [i.e. the depositors'] records", 500 F.2d at 757, along with the statements that "an unlawful invasion of *Miller's* privacy" occurred, *Id.* at 756 (emphasis added) and that "he whose rights are threatened by the improper disclosure here was a *bank depositor*, not a bank official." Id. at 758 (emphasis added).

[3] [The government]

> may not cavalierly circumvent *Boyd's* precious protection by first requiring a third party bank to copy all of its depositors' personal checks and then, with an improper invocation of legal process, calling upon the bank to allow inspection and reproduction of those copies.
> 500 F.2d at 757.

of his account,[4] the panel renounces earlier case law and accords to a depositor rights that he never enjoyed prior to passage of the Bank Secrecy Act. With unanimity the earlier cases denied to a depositor the standing to challenge IRS subpoenas of bank records pertaining to his banking transactions, including microfilm copies of checks. See *Harris* v. *United States*, 9 Cir. 1969, 413 F.2d 316; *Galbraith* v. *United States*, 10 Cir. 1968, 387 F.2d 617; *O'Donnell* v. *Sullivan*, 1 Cir. 1966, 364 F.2d 43, cert. denied 385 U.S. 969, 87 S.Ct. 501, 17 L.Ed.2d 433; *Application of Cole*, 2 Cir. 1965, 342 F.2d 5, cert. denied 381 U.S. 950, 85 S.Ct. 1803, 14 L.Ed.2d 723; *DeMasters* v. *Arend*, 9 Cir. 1963, 313 F.2d 79, cert. dism. 375 U.S. 936, 84 S.Ct. 341, 11 L.Ed. 2d 269; *Foster* v. *United States*, 2 Cir. 1959, 265 F.2d 183, cert. denied 360 U.S. 912, 79 S.Ct. 1297, 3 L.Ed.2d 1261.[5] Such records were deemed to be the property of the bank, and the cases denied recognition of any depositors' rights to them, whether sought under an ownership theory, see *Harris*, supra, *Galbraith*, supra; *O'Donnell*, supra, *Application of Cole*, supra, *DeMasters*, supra, *Foster*, supra, or by virtue of an agency

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[4] The panel opinion glides over the standing issue. At a minimum, a more detailed explanation of the panel's reasons for its action should be accorded to the United States.

[5] The records in the cases cited in the text encompassed books, papers, records, memos, and included signature cards, ledger sheets, deposit slips, credit files, applications for loans, financial statements, loan ledger sheets, memos relating to secured or unsecured commercial and personal loans, microfilms of checks and of debit memos charged to an account.

theory, see *Harris*, supra, and *Shulze* v. *Rayunec*, 7 Cir. 1965, 350 F.2d 666, cert. denied *Boughner* v. *Shulze*, 382 U.S. 919, 86 S.Ct. 293, 15 L.Ed.2d 234. Accordingly, as the Ninth Circuit held in *DeMasters*, supra, if any right was violated, the right was that of the bank, not the customer, and the bank could waive any right it might have to resist production under subpoena. 313 F.2d at 85.

While we have not located any case in which a depositor claimed a cognizable privacy interest sufficient to confer standing under *Katz* v. *United States*, 1967, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576, at least one post-*Katz* case which denied standing recognized that a check cannot be considered a confidential communication. See *Harris*, supra. When a customer writes a check, he "set[s] the check afloat on a sea of strangers", and knows when he does so that it

> will be viewed by various employees at the bank where it is cashed or deposited, at the clearing house through which it must pass, and at his own bank to which it will eventually return.

413 F.2d at 320-21. It is a negotiable instrument in commerce. See *Harris*, supra; *California Bankers*, 416 U.S. at 48-49, 94 S.Ct. at 1511, 39 L.Ed.2d at 833. A drawer has no assurance that his payee will not endorse, nor that the endorsee will not further endorse. Nor can he prevent this. In drawing a check, he does not exhibit an actual expectation of privacy which society is prepared to accept as reasonable. See *Katz*, 389 U.S. at 361, 88 S.Ct. at 516, 19 L.Ed.2d at 588 (Harlan, J., concurring).

The question presented by the government petition, which this Court by a one-vote margin declines to consider en banc, is whether the intervening statutory *requirement* of the Bank Secrecy Act of 1970 that banks compile and retain records of transactions with their customers, including microfilming, held constitutional in *California Bankers*, conferred standing upon depositors where it was not previously recognized.[a] Our position is that standing was not so conferred.

The fact that the United States by statute now requires banks to microfilm checks and other records of dealings with customers makes such records no more the property of the customer than they were when the banks microfilmed voluntarily. As the Supreme Court noted in *California Bankers*, the bank is not a disinterested bystander, but is a party to the transaction. 416 U.S. at 48-49, 94 S.Ct. at 1511, 39 L.Ed.2d at 833. It pays for the records and stores them. It could not be seriously contended that a customer has a right to them sufficient to obtain and retain possession of them. While of course the rec-

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[a] It should be pointed out that this precise issue was expressly reserved by the Supreme Court:

> Claims of depositors against the compulsion by lawful process of bank records involving the depositors' own transactions must wait until such process issues.

416 U.S. at 51-52, 94 S.Ct. at 1512, 39 L.Ed.2d at 835.

ords pertain to customers' accounts, they do not *ipso facto* become the depositors' records.

Nor is it any more reasonable now than heretofore to have a "reasonable expectation of privacy". Indeed it is less reasonable, because the records are now required to be maintained by statute, whereas prior to the passage of the Act microfilms were kept at the business discretion of banks, and customers were not informed of the practices of their own bank, or of other banks involved in the collecting process. See *Harris*, supra. Any one of the checks in the instant case might as easily have been endorsed by the payee to a third party. The privacy which is alleged to exist actually rests not in the expected confidentiality of communications with one's bank but in the belief that a party to a check will remain anonymous because viewers of the instrument will not know who he is, attach significance to the transaction, or remember its details.[7] We consider it an anomaly that

[7] Of course, the customer may reasonably expect that the bank will not release information pertaining to his affairs indiscriminately, to any chance person off the street making inquiries. This expectation may rest upon contract or fiduciary concepts, and may even be enforceable against the bank under state law. Fear of suit or the desire to retain or increase deposits may well impel a bank to contest a faulty subpoena, to give notice to the depositor that records of his account are sought, and to protect the customer's interests otherwise to the extent legally permissible. None of this however would suffice to protect a customer from a lawfully issued subpoena directed to a bank nor would it give him standing to contest it. See *McMann* v. *Securities and Exchange Commission*, 2 Cir. 1937, 87 F.2d 377, cert. denied, 301 U.S. 684, 57 S.Ct. 785, 81 L.Ed. 1342.

a statute designed to grant greater government access to bank records results here in a restriction on government access to such records. The result reached stands the statutory scheme on its head.

The Supreme Court decision in *California Bankers* does not compel a different result. The precise issue before the panel of this Court was there reserved for decision. See n. 6, *supra*. But the Supreme Court noted expressly that:

> We decided long ago that an Internal Revenue summons directed to a third-party bank was not a violation of the Fourth Amendment rights of either the bank or the person under investigation by the taxing authorities. See First National Bank v. United States, 267 U.S. 576, 45 S.Ct. 231, 69 L.Ed. 796 (1925), aff'g 295 F. 142 (SD Ala. 1924); Donaldson v. United States, 400 U.S. 517, 522, 91 S.Ct. 534, 538, 27 L.Ed. 2d 580 (1971). "[I]t is difficult to see how the summoning of a third party, and the records of a third party, can violate the rights of taxpayer, even if a criminal prosecution is contemplated or in progress." Donaldson v. United States, supra, at 537, 91 S.Ct. at 545 (Douglas, J., concurring).
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> 416 U.S. at 53, 94 S.Ct. at 1513, 39 L.Ed.2d at 835.[8]

Although the Court recognized that the bank acts under compulsion of the statute in taking checks and

[8] Cf. *Couch* v. *United States*, 1973, 409 U.S. 322, 93 S.Ct. 611, 34 L.Ed.2d 548; *White* v. *United States*, 5 Cir. 1973, 477 F.2d 757, aff'd en banc, 5 Cir. 1973, 487 F.2d 1335.

making the microfilms, "it is equally clear that in doing so *it neither searches nor seizes records in which the depositor has a Fourth Amendment right.*" 416 U.S. at 54, 94 S.Ct. at 1513, 39 L.Ed.2d at 836 (emphasis added). We find trouble in understanding the process by which a depositor acquires a greater Fourth Amendment right in the copies produced. See dissenting opinion of Mr. Justice Marshall, 416 U.S. at 97, 94 S.Ct. at 1535, 39 L.Ed.2d at 861, in which he points out that the majority opinion intimates a lack of standing on the part of customers respecting copies. This Court's panel in *Miller* confuses the rights of the banks with the rights of their depositors.[9]

Going to our second objection to the panel holding, and assuming that appellant Miller had standing to challenge the validity of the subpoenas, we do not agree that they were defective. And even if the subpoenas were defective, no prejudice is shown such as to rquire their suppression. This court at a minimum should remand for hearing and determination by the district court as to whether the government was preparing in good faith for presentment of pertinent records to the grand jury or was merely on a "fishing expedition".

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[9] The Supreme Court's concern as to limiting access to records "by existing legal process" alluded to by the panel opinion, 500 F.2d at 757, is not inconsistent with this position Under existing legal process only the banks have standing to object.

The process referred to by the Supreme Court in *California Bankers* is "*existing*" legal process. 416 U.S. at 52, 94 S.Ct. at 1513, 39 L.Ed.2d at 835. That case imposed no stricter standard where bank records are the object demanded for production than for production of any other type of record.[10]

The *Miller* panel's finding of defectiveness apparently stems from three circumstances: (1) the delay of nineteen days between the issue date of the subpoenas and the scheduled grand jury meeting, (2) the lack of a return on the process, and (3) the fact that the U. S. Attorney, rather than the court or the grand jury, initiated the process.[11] We are persuaded

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[10] Mr. Justice Powell, in his concurring opinion joined by Mr. Justice Blackmun, expressed concern over the potential for abuse should the regulation's reporting requirements be significantly extended. 416 U.S. at 78-79, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-51. This concern arises because

> the legislative scheme permits access to this information without invocation of the judicial process. In such instances, the important responsibility for balancing societal and individual interests is left to unreviewed executive discretion, rather than the scrutiny of a neutral magistrate.

416 U.S. at 79, 94 S.Ct. at 1626, 39 L.Ed.2d at 850-51. But the *Miller* panel of this Court faced an entirely different situation. The reporting provisions are not involved in this case. Access was sought by means of "judicial process", i.e. grand jury subpoena, to copies of bank records. Further, the subpoena when issued was subject to scrutiny by a neutral magistrate should its validity be challenged by individuals with standing. See F.R.Crim.P. 17(c).

[11] See the statement, 500 F.2d 757-758:

> Surely a purported grand jury subpoena, issued not by the court or by the grand jury, but by the United States

nonetheless that the subpoenas were not faulty so long as the U. S. Attorney was preparing in good faith for the grand jury session. *Morton Salt*, infra.

The panel finds merit in Miller's objection that the subpoenas were not issued at the direction of the court or at the instance of the grand jury, but solely at the discretion of the U. S. Attorney.[12] There is no basis for valid objection to this practice. It is entirely normal and usual, has been repeatedly upheld, is necessary to the efficient investigation of crime by conserving a grand jury's time, and is authorized by F.R.Crim.P. 17(a). See *United States* v. *Culver* (D. Md. 1963) 224 F.Supp. 419; *In re Subpoena Duces Tecum* (E.D. Tenn. 1916) 248 F. 137.

United States v. *Morton Salt Co.* (D.Minn. 1962), 216 F.Supp. 250, aff'd 382 U.S. 44, 86 S.Ct. 181, 15

Attorney's office, for a date when no grand jury was in session, and which in effect compelled broad disclosure of Miller's financial records to the government, does not constitute sufficient "legal process" within the meaning of the majority opinion.[6]

This *ad hominem* statement, together with a footnote (n. 6, at p. 758 of 500 F.2d) and accompanying text, revisiting Mr. Justice Powell's *caveat* (416 U.S. at 78-79, 94 S.Ct. at 1526, 39 L.Ed.2d at 850-851), represents the closest approach of the *Miller* panel to a statement of reasons for finding the process defective.

[12] Miller argues on brief that the subpoenas did not issue under an order of court, an apparent basis in part for the court's decision. We assume in this dissent that Miller's complaint—that the subpoenas did not issue when the grand jury was in session—includes a claim of defectiveness because not issued at the grand jury's request.

L.Ed.2d 36, is closely in point. In *Morton Salt* the U.S. Attorney procured a subpoena duces tecum issued from the office of the clerk of the court on December 28, 1959, although the grand jury was not to be impaneled until February 17, 1960. The defendants contended that this procedure was improper. The court termed this argument "patently unsound". 216 F.Supp. at 257. The special prosecutor, an attorney from the Anti-Trust Division of the Department of Justice, was duly authorized to conduct the investigation, and acted under his authority in procuring the issuance. *Id.*

The *Miller* panel opinion also relies on the circumstances that no grand jury was in session when the subpoenas issued and that no returns were made of service thereon.

We stated in *United States* v. *Hedge*, 5 Cir. 1972, 462 F.2d 220, 223, that a witness subpoena for a trial was properly returnable only at the place of trial, and that a subpoena directing witnesses to appear at the U. S. Attorney's office on the Sunday before trial was improper, citing Rule 17(a) F.R. Crim.P., but refused to find prejudice to the appellant in the violation of the rule. Accord, *United States* v. *Standard Oil Co.*, 7 Cir. 1963, 316 F.2d 884. We find no conflict between the position we take and the view announced in *Hedge*, supra. It bears emphasis that *Hedge* dealt with a trial situation, in contrast to the grand jury investigation involved in *Miller*. In our judgment, the difference is controlling. To the extent, if any, that *Hedge* announces a

rule at variance with the Supreme Court's holding in *Morton Salt*, supra, it should go without saying that we must follow the Supreme Court.

The U. S. Attorney is the guiding arm of the grand jury, concerned with the orderly presentation of information before that body. It is customary practice in the courts for documents and witnesses to be subpoenaed in advance to eliminate unnecessary material, allow for the orderly presentation of evidence, and save the time of grand jurors.[13] See *United States* v. *Johns-Manville Corp.*, E.D. Pa. 1962, 213 F.Supp. 65, n. 20 at 73-74. To refuse the U. S. Attorney power to subpoena documents before the grand jury actually meets in situations where he is preparing in good faith to make a presentation to the grand jury substantially interferes with the orderly operation of that body.

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[13] In *Morton Salt, supra,* an impounding order was issued by the court on January 25, 1960, after the subpoena was issued. The trial court held that the right of government counsel to inspect the documents before presenting them to the grand jury fell within the scope of F.R.Crim.P. 17(c). 216 F.Supp. at 257. Whether a court order is mandatory was not addressed. Our tendency would be to hold that it is not. Interpretations of F.R.Crim.P. 17(c) indicate that the provision for court order was designed to apply, not in situations as in *Miller*, but to pretrial production of documents in order to expedite trials and avoid delays while parties search for and read documents before offering them into evidence. See 8 Moore's Fed. Prac. ¶ 17.07; 1 Wright. Fed. Prac. and Proc. § 274 at 550-51. Even in this situation, the jurisprudence is unclear as to whether the court's discretion must be invoked. See 1 Wright, Fed. Prac. and Proc. § 274 at 551.

The grand jury in the instant case did in fact meet nineteen days after the subpoenas duces tecum were issued. There should be no suspicion of prosecutorial bad faith on the sole basis of production being sought at a time prior to the date when the grand jury was to meet. We do not read Miller's allegations of a "fishing expedition" to urge that the records were not sought on behalf of the grand jury for an investigation by that body. If they are to be so construed, a remand is in order for a hearing as to whether the U. S. Attorney was or was not preparing in good faith to present relevant matters to the grand jury.

Finally, even if it is held that the process was defective because the grand jury was not in session, we indicated in *Hedge*, supra, that a showing of prejudice was necessary before corrective action should be ordered. It is impossible to read prejudice as present *ipso facto* on the basis of the grand jury being out of session, or the failure to endorse a return on the process.

For the foregoing reasons, we dissent from the failure of the court to consider this case en banc. This decision, now permitted to stand, will impose severe handicaps to the orderly conduct of official business by U. S. Attorneys throughout this Circuit.

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